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No. 102

In the Supreme Court of the United States

October Term, 1961

D. H. Ess and Subsidiary Co., Inc., Petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 162

D. H. ROE AND STRATORAY OIL, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 287 F. 2d 435 (Pet. App. 1–15).

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1961. A petition for rehearing was denied May 23, 1961. The petition for a writ of certiorari was filed June 19, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly held that, on the evidence, the issue of whether the oil leases

which the petitioners sold were securities was one to be resolved by the jury on a new trial.

STATUTE INVOLVED

Section 2(1) of the Securities Act of 1933, as amended, 15 U.S.C. 77b(1) provides:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.
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> * * * * *

STATEMENT

In the United States District Court for the Northern District of Texas, the petitioners were convicted on five counts of unlawful use of the mails in the sale and delivery of unregistered securities in violation of subsections 5(a) (1) and (2) of the Securities Act of 1933, 15 U.S.C. 77e(a) (1) and (2). On appeal, it was held that the allegations of the indictment were sufficient to charge the violations defined in Section 5(a) of the Act, and that the evidence of the transactions alleged, if credited, would constitute "the sale or delivery of an 'invest-

ment contract,' hence a 'security' thereby requiring registration with the SEC'' (Pet. A–9). The court of appeals reversed the conviction, however, because it held that the determination of whether the transactions constitute sales of investment contracts rather than mere leases involved a question of fact which had not properly been submitted to the jury under an [illegible]iate charge. The petitioners seek to have this Court review that determination and hold that, as a matter of law, they were entitled to a judgment of acquittal on the ground that the interests which they sold were not securities.

The pertinent facts may be summarized as follows:

In 1954, Mr. Roe incorporated Stratoray Oil, Inc., of which he became president, and subsequently pursued through that corporation the business of selling oil leases through the mail (R. 31, 32, 337, 405, 416, 553, 569, 644, 728, 737).

The petitioners had acquired oil and gas leases on large blocks of land in Texas and Utah (R. 33, 34, 40–42, 234–238). From March, 1956, through April, 1957, leases to small parcels of 10 to 40 acre units were offered throughout the country (R. 137, 155, 171) at prices starting as low as $3.50 an acre, by means of more than 50,000 letters mailed to prospective investors (R. 83, 85, 87, 96, 100, 103–107, 110, 112, 122, 187, 246, 258, 416, 435, 444, 566, 583, 610, 677). In the year 1956 alone, the petitioners received about $233,000 from the sale of these leases (R. 476). Petitioner Roe testified that toward the end of that year there were "roughly one thousand" investors (R. 418).

Promotional letters sent out by the petitioners described test wells being drilled or to be drilled on or near the parcels of land offered. References were made specifically to two wells, one in Texas, and one in Utah, which were adjacent to the respective leaseholds being offered (R. 562–571, 581, 603–612). It was asserted that Mr. Roe, described as a qualified student of electronics and geophysics and an experienced oil operator (R. 142), had perfected a device known as a scintillator which was a "wholly SCIENTIFIC OIL-HUNTING INSTRUMENT CAPABLE OF DETECTING THE PRESENCE OF RICH OIL ACCUMULATIONS AHEAD OF THE DRILL" (R. 603). By means of this device, it was claimed, he could discover oil deposits which would enable each investor to put himself in position to "REALLY 'CLEAN UP' BIG". (R. 567). Prospective investors were told that Mr. Roe expected to discover a "stupendous volcano of liquid gold" (R. 136) which would "*precipitate a stampede* of oil men seeking to buy leases, willing to bid *high prices*" (R. 680) as high as $2,000 per acre (R. 621).

In addition to the opportunity to become "*BIG RICH*" (R. 630) by the purchase of a lease, Mr. Roe offered investors "*THE PRIORITY RIGHT* TO BUY LEASES ON SUBSEQUENT SELECTIONS MADE BY ME WITH THE INSTRUMENT" which "COULD BE THE MEANS OF *PYRAMIDING* YOUR INITIAL WINNINGS * * * *REPEATEDLY* * * * *UNTIL THEY AMOUNT TO NOTHING LESS THAN OUTRIGHT FORTUNE FOR YOU*" (R. 686).

With respect to the two wells that were the principal subjects of the promotional letters, Mr. Roe's interests were not limited to ownership of neighboring leaseholdings. The site of the well in Utah had been selected by him (R. 39). Gamma Radiation Surveys, Inc., a corporation formed and largely owned by Mr. Roe (R. 37, 426) and of which he was president (R. 425), owned a one-fourth interest in this well (R. 38–39) and paid part of the drilling costs for it (R. 58–60). Part of these funds, which were "donated" to the driller (R. 204), came from Mr. Roe as loans (R. 425). The well in Texas was drilled by a co-incorporator and co-owner of Gamma Radiation Surveys (R. 426, 557–558) on land selected by Mr. Roe by means of his scintillator (R. 375, 630) and owned by Stratoray (R. 45).

ARGUMENT

The determination below that on the evidence a jury could properly find that the petitioners were selling investment contracts was clearly correct under this Court's decisions in *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U.S. 344 and *Securities and Exchange Commission* v. *Howey Co.*, 328 U.S. 293. There is therefore no reason for this Court to review the interlocutory order of the court of appeals directing a new trial.

In this case, the plan of distribution involved the subdivision of a large tract into small tracts which could not be economically developed individually. The economic inducement was the opportunity to profit from the exploration and drilling operations

of another. There was no suggestion in the sales letters that investors might attempt to develop their own leases, as distinguished from selling them, nor of the means of meeting the financial burdens and other problems purchasers would encounter if they attempted to do so. The petitioners represented that the wells were being drilled on sites selected by them, and entered into detailed discussions of the progress of wells being drilled. Mr. Roe told investors that they could rely on his skill and experience as a scientist. Considering all this evidence together, a jury would clearly be justified in finding that the interests sold by petitioners were an investment contract as that term was defined in the *Howey* decision, 328 U.S. at pp. 298–299:

> * * * an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. * * *

This case is on its facts very close to *Joiner* and *Howey*. The *Joiner* case involved a sales campaign offering assignments of oil leases together with assurances that the offeror was engaged in and would complete the drilling of a test well so located as to test the oil-producing possibilities of the offered leaseholds. Language in the advertising literature emphasized the character of the purchase as an in-

vestment and a participation in an enterprise. This Court held that the interests sold were securities since the economic inducements of the proposed and promised exploration well led purchasers to rely on defendants for an increase in value of their leaseholds. In *Howey* there was an offer for sale of small portions of a large orange grove with the offer of the services of a company engaged in cultivating and developing these groves. Each prospective customer was told that it was not feasible to invest in a grove unless service arrangements were made. The Court held that the contracts sold were "investment contracts" within the meaning of Section 2(1) of the Securities Act since the scheme involved "an investment of money in a common enterprise with profits to come solely from the efforts of others". 328 U.S. at p. 301.

The petitioners seek to distinguish those decisions on the ground that here there was no evidence that the sellers of the leases were in any way responsible for the steps relied upon to increase the value of the leases. As appears from the Statement (*supra*, pp. 4–5), contrary to the petitioners' assertions (Pet. 11), the record supports the determination of the court below that a jury would be justified in finding that the petitioners "had, directly or indirectly, made substantial contributions toward the test wells" (Pet. A–8). Moreover, the representations as to selection of sites for drilling and the stress on Mr. Roe's skill as a scientist indicate that the petitioners invited investors to rely on them for information, advice and protection. This type of representation alone

was sufficient to permit a finding of an "investment contract". See *Securities and Exchange Commission* v. *Wickham,* 12 F. Supp. 245 (D. Minn.), cited in *Howey* (328 U.S. at p. 299). As pointed out in *Joiner* (320 U.S. at p. 353), in the enforcement of the Securities Act "it is not inappropriate that promoters' offerings be judged as being what they were represented to be."

Even without such evidence, however, it is clear that there can be an investment contract. As the court below pointed out (Pet. App. 7), the promoters "were selling a chance to make a great deal of money from activities which were then, or would shortly be, carried on by persons other than the purchasers. In that setting it mattered not whether the test wells were to be drilled by the sellers, or by third persons either under, or independent of, their control." What was of significance in this case was the "character the * * * [agreement between promoter and assignee] is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." *Securities and Exchange Commission* v. *Joiner Corp.,* 320 U.S. at pp. 352–353. As in *Joiner,* the "exploration enterprise was woven into these leaseholds, in both an economic and a legal sense"; and as this Court found in *Joiner,* the "trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end." (320 U.S. at pp. 348, 349.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

ALLAN F. CONWILL,
General Counsel,
DAVID FERBER,
Assistant General Counsel,
FAITH COLISH,
Attorney,
Securities and Exchange Commission.

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